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No. 90-1620

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT PEARSON, ET. AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 40 U.S.C. 13k, as construed, is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 581 A.2d 347. The superior court opinion (Pet. App. 26a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1990. A petition for rehearing was denied on February 20, 1991. The petition for a writ of certiorari was filed on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

The nine petitioners were charged by information in the Superior Court for the District of Columbia with one count

of unlawful parading and assemblage on Supreme Court grounds, in violation of 40 U.S.C. 13k,[1] and one count of unlawful entry, in violation of 40 U.S.C. 13*l* and Regulation 2 thereunder.[2] Following bench trials upon stipulated facts for petitioners Pearson, Cullinen, Lopes, Moran, Silva, and Williams, and conditional guilty pleas by petitioners Radich, Krail, and Veltri, all petitioners except Radich were convicted on both counts.[3] The court imposed concurrent sentences of probation and separate fines of $10 on each count. Gov't C.A. Br. 3.

1. Petitioners participated in a January 1988 march to the Supreme Court of the United States protesting the Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). Pursuant to Regulation Two and in anticipation of the march, the Marshal of the Supreme Court ordered certain portions of the Court grounds, including the plaza and the main steps, closed to the general public between 1:00 and 6:00 p.m. that day. Notice of the closure was posted, barricades

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[1] That statute, in pertinent part, makes it unlawful to "parade, stand, or move in processions * * * in the Supreme Court Building or grounds." 40 U.S.C. 13k. See Pet. 2. A separate clause of the statute, not at issue here, prohibits certain displays of flags, banners, and devices. *Ibid.* See *United States* v. *Grace*, 461 U.S. 171, 175 (1983) (regarding severability of two clauses).

[2] Regulation Two, promulgated by the Marshal of the Supreme Court pursuant to 40 U.S.C. 13*l*, authorizes the Marshal to declare at any time that the Supreme Court building and grounds are closed to the general public and provides that persons refusing to leave after being requested to do so are subject to the penalties provided in 40 U.S.C. 13m. See Pet. App. 3a n.2. Petitioners do not renew in this Court their challenges to Regulation Two. See Pet. 6 n.3.

[3] Petitioner Radich pleaded guilty only to the count charging him with violating Regulation Two. His conditional guilty plea, like that of his co-defendants, preserved his right to appeal the denial of his motion to dismiss both counts. Gov't C.A. Br. 3.

were erected at the top of the steps leading to the plaza, and petitioners were advised that they would be subject to arrest if they entered the plaza. Petitioners nonetheless entered the plaza and knelt in prayer. Petitioners were arrested after they twice were asked to disperse and twice were informed they were violating the law. Pet. App. 2a-4a.

2. The Superior Court denied petitioners' motion to dismiss the information. Pet. App. 26a-46a. In rejecting petitioners' claim that the applicable statutes and regulation violate the First Amendment, the court held that the Supreme Court plaza is not a public forum. *Id.* at 30a-35a. Accordingly, the court explained, regulation of expression on the Supreme Court plaza is constitutionally permitted "so long as the regulation is both reasonable and not an effort to suppress the speaker's point of view." *Id.* at 33a (internal quotation marks omitted). The court held that the statutes and regulation met this test. *Id.* at 34a-36a & n.7. Alternatively, the court held that the statutes and regulation would be valid under the First Amendment even if the Supreme Court plaza were a public forum. *Id.* at 36a-41a.

Finally, the court rejected arguments that the statute and regulation were unconstitutionally vague or overbroad in prohibiting all processions or assemblages on the plaza. *Id.* at 41a-45a. The court ruled that Section 13k is susceptible to a "limiting construction consistent with its purposes to 'provide for the protection of the [Supreme Court] building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum' * * * and 'to preserve the appearance of the Court as a body not swayed by external influence.'" Pet. App. 43a (quoting *United States* v. *Grace*, 461 U.S. 171, 182 (1983)).

3. The court of appeals affirmed. Pet. App. 1a-25a. The court first concluded that the Supreme Court plaza is a nonpublic forum. *Id.* at 7a-13a. The court then observed that it had previously held in *United States* v. *Wall*, 521 A.2d 1140,

1144 (1987), that "section 13k's prohibition on processions and assemblages in the plaza area and main entrance steps of the Supreme Court met the test imposed on the exclusion of speakers from non-public forums as a reasonable and viewpoint-neutral regulation of speech." Pet. App. 12a (internal quotation marks omitted).

The court noted the "limited utility in some circumstances of focusing on whether the tangible property is a public forum when a restriction can be upheld as a reasonable time, place or manner restriction." Pet. App. 12a-13a. In *Wall*, the court observed, it had concluded that, regardless of the status of the plaza as a public or nonpublic forum, Section 13k was valid because it was "narrowly tailored and served the significant interest of the government in preserving the integrity of the judiciary." *Id.* at 13a. The court rejected petitioners' contention that intervening Supreme Court decisions had undermined the validity of *Wall*, Pet. App. 13a-17a, pointing out that the Court had recently held that, even in a public forum, a limitation on speech "need not be the least restrictive or least intrusive" means to accomplish a valid purpose. *Id.* at 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798-800 (1989)). Finally, the court rejected arguments that the statute and regulation were unconstitutionally overbroad and vague, Pet. App. 17a-25a, explaining that the "assemblages" clause was readily susceptible to a narrowing construction limiting its application to "group demonstrations directed at the Court which compromise the dignity and decorum of the Court or threaten the Court grounds or its property or personnel." *Id.* at 22a. The narrowing construction was not unconstitutionally vague, since "the government concern underlying section 13k is readily identifiable" and the provision would apply only to activity that was plainly "inimical to the Court's functions." *Id.* at 21a; see also *id.* at 22a.

ARGUMENT

1. a. Petitioners argue that the statutory prohibition in 40 U.S.C. 13k on their assembly on the Supreme Court plaza to convey their views about judicial decisions is invalid under the First Amendment. Petitioners' claim is unavailing because the Supreme Court plaza is not a public forum for First Amendment activities.

An area that "by long tradition" has been "devoted to assembly and debate," *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), is classified as a public forum that is generally open to expressive activity by the public. Public streets, parks, sidewalks, and other nonspecialized public spaces are the paradigm examples of property that has "time out of mind" been held open for communicative activity. See *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939). As this Court has often stated, however, the First Amendment does not guarantee unlimited access to publicly owned property for expressive activities, and thus not all public property is a public forum. See *Perry*, 460 U.S. at 46 (1983); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981); accord *Greer* v. *Spock*, 424 U.S. 828 (1976) (military reservation not a public forum); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jail grounds not a public forum); *United States* v. *Kokinda*, 110 S. Ct. 3115, 3119 (1990) (walkway surrounding post office not a public forum) (plurality opinion).

The character of the public property, and the use to which it is dedicated, determine the government's ability to restrict expression in a particular location. Thus, even if government property is accessible to the public and bears some physical resemblance to streets, parks, or sidewalks, that property is not necessarily a public forum for First Amendment purposes. See *Kokinda*, 110 S. Ct. at 3120 (citing *Greer* v. *Spock*, 424 U.S. 828) ("The mere physical char-

acteristics of the property cannot dictate forum analysis."). Rather, the question is whether the property is set aside for a specialized use that is incompatible with the unrestricted availability of that property for expressive activity by the public.

On this analysis, the Supreme Court plaza, unlike the perimeter sidewalk surrounding the plaza (see *United States* v. *Grace*, 461 U.S. 171, 179),[4] is not a public forum. In contrast to the streets and sidewalks that immediately surround the Court grounds, the plaza, buildings, and grounds of the Supreme Court are, like the offstreet postal walkway in *Kokinda*, physically "remote from pedestrian thoroughfares." See *International Society for Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576, 581 (2d Cir. 1991) (discussing *Kokinda* decision). The Supreme Court grounds are also functionally distinct from those areas. The area does not exist "to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 110 S. Ct. at 3120. "Persons using the [Court grounds] are not there primarily to meet a friend for lunch, windowshop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." *Lee*, 925 F.2d at 581.

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[4] In *Grace*, the Court held that the clause of 40 U.S.C. 13k that forbids some displays of a "flag, banner or device" on Supreme Court grounds is not valid as applied to the perimeter sidewalk of the Court. While the Court did not address whether the Supreme Court plaza is a nonpublic forum, it cited the teaching of *Greer* v. *Spock* that "property is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours." 461 U.S. at 178; see also *id.* at 177. Moreover, the Court took note of the contention that "[a]lthough the [Supreme Court] property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities." *Id.* at 178.

b. This Court recently reaffirmed the "long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s].'" *Kokinda*, 110 S. Ct. at 3119 (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)). In a nonpublic forum, a restriction on speech is valid if it is reasonable, viewpoint-neutral, and not motivated by a desire to suppress the speaker's viewpoint. *Perry Education Ass'n*, 460 U.S. at 46; see also *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985) ("The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."); *Kokinda*, 110 S. Ct. at 3119-3120.

The restriction in this case satisfies these requirements. As construed by the court of appeals, the "assemblages" clause of Section 13k is a reasonable means to advance a valid purpose: protecting the Supreme Court from the disruption of its work or the possible public perception that the Court is subject to influence by factors extrinsic to the judicial process. Demonstrations on the Supreme Court grounds carry the risk of interfering with the functioning of the Court, a concern that the government may legitimately consider in promulgating general regulations governing conduct in a nonpublic forum. See *Kokinda*, 110 S. Ct. at 3123-3124. In addition, just as the government has a legitimate interest in protecting against actual judicial impropriety, Congress may also "protect the judicial process from being misjudged in the minds of the public." *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (upholding the constitutionality of a state statute making it illegal to picket or demonstrate near a court). See also *Grace*, 461 U.S. at 183 (acknowledging the validity of the goal of preventing

the appearance "that the Supreme Court is subject to outside influence"); compare *Greer* v. *Spock*, 424 U.S. at 839 (ban on partisan political activities at military base was reasonable means of insulating military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates").[5]

It is equally clear, as petitioners concede (Pet. 15 n.9), that Section 13k is not, either as drafted or as applied here, "an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800. Petitioners do not claim that Section 13k discriminates among particular viewpoints or that they were arrested and prosecuted because the government disagrees with the view they were attempting to suppress.

c. There is no merit to petitioners' suggestion (Pet. 10, 12-13) that classifying the Supreme Court plaza as a nonpublic forum is in conflict with decisions of other courts.[6]

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[5] Petitioners claim (Pet. 12) that "[b]y considering the 'purpose' of this Court in determining whether the plaza constituted a public forum, the court [below] improperly injected consideration of the asserted interest in restricting speech—'preserving the integrity of' and public confidence in the judiciary—into its analysis of whether the plaza constituted a public forum." However, there is nothing improper about taking into account the specialized use for which the government has reserved its property in determining whether the property qualifies as a public forum. In numerous cases in which this Court has declined to classify public property as a public forum, it has relied on interests related to the particular function that the property serves. See *Adderley* v. *Florida*, *supra* (jailhouse grounds); *Greer* v. *Spock*, *supra* (military installation); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303 (1974) (public buses); *Kokinda*, 110 S. Ct. at 3120 (postal walkway "constructed solely to provide for the passage of individuals engaged in postal business").

[6] There is no inconsistency between classifying the Supreme Court plaza as a nonpublic forum and the holding in *Jeanette Rankin Brigade* v. *Chief of the Capitol Police*, 342 F. Supp. 575 (D.D.C.), aff'd mem., 409 U.S. 972 (1972), that the U.S. Capitol grounds are a public forum. The district court in *Jeanette Rankin* relied on its observation that

At issue in *Smith* v. *County of Albemarle*, 895 F.2d 953 (4th Cir.), cert. denied, 111 S. Ct. 74 (1990), was the status of "the front lawn of the County Office Building," not the grounds of a building used exclusively as a courthouse.[7] In addition, the court of appeals in *Smith* agreed with the district court's determination that the lawn was a "designated" public forum based on the expressive activities that had taken place there, including "a beauty pageant, a billboard for the United Way, two Easter 'sunrise' services, several assorted weddings, municipal band concerts, and a civil rights demonstration." *Id.* at 954, 955. Analogous activities have never been permitted on Supreme Court grounds.

2. a. The court of appeals in this case also correctly held that, even if the Court's grounds are a public forum, Section 13k is a valid time, place, or manner restriction. The fact that Section 13k forbids altogether a category of speech in a defined location does not render the statute invalid as applied to a public forum, as this Court acknowledged in *Frisby* v. *Schultz*, 487 U.S. 474 (1988). There, the Court

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"the primary purpose for which the Capitol was designed—legislating—[is not] incompatible with the existence of all parades, assemblages, or processions which may take place on the grounds." 342 F. Supp. at 584. The court also observed that, in contrast, courthouses are among the "areas which the state may shield from the clamor of public demonstrations." *Id.* at 583 (citing *Cox* v. *Louisiana*, 379 U.S. 559 (1965)).

[7] At one point, the court of appeals in *Smith* made a passing reference to the property as "the courthouse lawn" 895 F.2d at 959, but it is clear that the building served as a general office building for county government business, even if it was sometimes referred to as the "courthouse." The court of appeals described the property at issue as "the front lawn of the County Office Building," or "the lawn in front of [the] seat of government," 895 F.2d at 954-959, and there was no mention of a courthouse in the district court opinion. See *Smith* v. *Lindstrom*, 699 F. Supp. 549 (W.D Va. 1988).

held that a ban on demonstrations on a residential street as applied to picketing directed at a particular residence was a valid means of preserving residential privacy. The Court stated that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 485; see also *ibid.* ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.").

The proscription on demonstrations on Court grounds is no more extensive than necessary to advance valid government interests. See Pet. 16 n.10. The ban operates in a defined location (the Supreme Court building and grounds), and there are ample alternative opportunities for similar First Amendment activities nearby (that is, on the municipal sidewalk surrounding the Court). See *United States* v. *Grace*, *supra*). See also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding blanket ban on expressive "sleeping" in Washington D.C. parks, finding that "the regulation narrowly focuses on the Government's substantial interest in maintaining the parks"); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (upholding complete ban on posting of signs on public property); *Kokinda*, 110 S. Ct. at 3125-3126 (Kennedy, J., concurring) (complete ban on in-person solicitation on postal walkway is valid time, place, or manner regulation).

b. Petitioners suggest (Pet. 15-18) that Section 13k must be subject to the "most exacting scrutiny" because the government has sought to eliminate demonstrations from Supreme Court grounds "out of concern for their likely communicative impact." Pet. 16 (quoting *United States* v. *Eichman*, 110 S. Ct. 2404, 2409 (1990)). That characterization is misleading, because the government is not concerned with whether the public will be swayed by the primary message the demonstrators seek to convey, but, instead, with

the "secondary effects" of demonstrations on Court grounds—that is, the creation of the appearance that the Court is influenced by public pressures in deciding cases. See, *e.g.*, *Barnes* v. *Glen Theatre, Inc.*, No. 90-26 (June 21, 1991) (Souter, J., concurring), slip op. 3-6. Section 13k is directed at a wholly "neutral" purpose of protecting the Court. Thus, the government's interest is unrelated to the desire to promote or suppress communication on particular topics or ideas, and Section 13k applies in an evenhanded manner regardless of the underlying subject matter or viewpoint of the demonstration.[8]

3. There is no merit to petitioners' claim (Pet. 18-20) that Section 13k, as construed by the court of appeals, is impermissibly vague. Unlike in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), and *Baird* v. *Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970), aff'd, 405 U.S. 438 (1972) (see Pet. 18-19), the construction adopted by the court limiting the "assemblages" clause is based on valid statututory objectives, see *Grace*, 461 U.S. at 182, and is reasonably clear with regard to conduct it reaches. The statute as construed by the court of appeals is not so amorphous as to "grant standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22 (1972).

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[8] Contrary to petitioners' suggestion, this case is not analogous to *United States* v. *Eichman*, *supra*, and *Texas* v. *Johnson*, 491 U.S. 397, 407 (1989). In those cases, the government sought to foster a reverential view of the flag by suppressing its use to express contrary views. Here, in contrast, the government has restricted activities only in a certain location and only to the extent that they have the potential to cause injury to property or persons, or to disrupt the decorum and order of the Court, or to create the impression that the Court is subject to influence by public demonstrations. The government has not sought to suppress negative views of the Court or the Court's decisions; the restrictions apply without regard to the content of the expression or the viewpoint expressed.

Rather, the determination whether persons are engaged in a demonstration that threatens persons, property, or judicial decorum is a sufficiently objective matter that the public and the officers charged with the statute's enforcement can determine with reasonable confidence what conduct is forbidden. See *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *Kolender* v. *Lawson*, 461 U.S. 352, 357-362 (1983). See also *Boos* v. *Barry*, 485 U.S. 312 (1988) (upholding construction of statute prohibiting persons from congregating within 500 feet of a foreign embassy as applying only to "congregations that are directed at an embassy" and that present a "threat to the security or peace of the embassy").

Petitioners do not, and could not, claim to be uncertain as to whether their conduct is proscribed. Not only did the statute as written provide petitioners with "fair warning" that their conduct was forbidden, but they were told that the Supreme Court plaza was closed to their activities during the time in question.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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